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In the

Supreme Court of the United States

October Term, 1970

No. 163

ELEANOR TAFT TILSON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RALPH, ELIZABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANKENHAND, JAY S. ROTH, CARL W. SCHNEIDER, NORMAN T. DAVIS, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PRENDERGAST, *Appellants*,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE, *Appellees*.

On Appeal From a Three-Judge United States District Court for the District of Connecticut

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN COLLEGES, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES AND THE COUNCIL FOR THE ADVANCEMENT OF SMALL COLLEGES IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON, *Appellants*,

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE, *Appellees*.

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INTEREST OF AMICI CURIAE

The American Council on Education, the Association of American Colleges, the National Association of State Universities and Land-Grant Colleges, the Association of American Universities and The Council

for the Advancement of Small Colleges appear before the Court as amici curiae by reason of their interest in the resolution of the important constitutional issues under the first and fourteenth amendments which have been raised in the District Court below. The amici do not appear as champions of any particular institutional interests but as representatives of their common interest in United States higher education, undergraduate and graduate.

The American Council on Education is a council of national and regional education associations and institutions of higher education. Since its founding in 1918, the Council has been a center of cooperation and coordination for the improvement of education at all levels, with particular emphasis on higher education. Membership in the Council is by organization or institution, not by individual. There are institutional members from the 50 states, the District of Columbia, the Canal Zone, Guam and Puerto Rico representing 69 percent of the public and 80 percent of the private accredited institutions of higher education in the United States.

The present members and affiliates of the Council are as follows: 21 national and regional associations and organizations; 1,349 institutions of higher education, including the four institutions involved in the case at bar; and 83 affiliated institutions and organizations. In addition to national and regional organizations having interests related to education, associated organization members include state departments of education, city school systems, and private school systems.

The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of com-

plex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal education as distinct from professional or vocational training.

The present membership of the Association in the United States (excluding four overseas institutions) comprises 869 colleges and universities. This represents over 90 percent of all accredited liberal arts colleges and nearly 60 percent of all degree-granting institutions in the United States. Of these 869, 56 percent (487 institutions) are officially classified as affiliated with one or other of the churches; 18 percent (155 institutions) are maintained by federal, state or local government and 26 percent (227 institutions) are subject only to the authority of their own governing bodies and independent of any external control other than the public law.

The National Association of State Universities and Land-Grant Colleges represents a unification in 1963 of the membership of the Association of State Universities and Land-Grant Colleges, founded in 1887; the National Association of State Universities, founded in 1895; and The State Universities Association, founded in 1918. The first two named are the nation's oldest organizations of institutions of higher education.

The Association's membership includes 113 universities and colleges of which 13 are major campuses of member multi-campus universities. Of these, 69 are land-grant institutions (counting multi-campus universities as one); one is a city university; and the others

are major state universities which are not "land-grant" institutions (though several received federal grants of land under acts other than the Morrill Act). Two land-grant institutions (Cornell University and the Massachusetts Institute of Technology) are privately controlled. Affiliated with Cornell are certain contract colleges of the State University of New York.

Academic programs of NASULGC institutions encompass the full range of the arts, humanities and sciences. They award about 30 percent of all four-year bachelors and first professional degrees, 40 percent of all master's degrees, and 60 percent of all doctorates.

The Association of American Universities is a group of 46 major public and private American universities preeminent in graduate study and research. These universities award approximately three-quarters of the Ph.D.s produced in the nation and conduct approximately the same proportion of the university-based research.

The Council for the Advancement of Small Colleges admits to membership nonprofit, independent, private, four-year, liberal arts colleges with an enrollment of no more than 1,500 students. Each college must either have attained Correspondent status with its regional accrediting association or have been listed, or present evidence of eligibility for listing, in the *Education Directory, Part 3, Higher Education* published by the United States Office of Education.

The present membership of the Council comprises 91 colleges and universities in 35 states. Of these institutions, 61 are fully accredited. None of the member colleges are maintained by federal, state or local government. Seventy-one percent (65 institutions) are affiliated with some church and 29 percent (26 institu-

tions) are independent of any external control other than public law.

The great majority of the member institutions of the amici participate in various federal programs of higher education and, in particular, benefit from programs under the Higher Education Facilities Act of 1963. The constitutional validity of many, if not all, of these programs as applied to both secular and nondenominational colleges and universities is at issue as a result of the decision of the United States District Court for the District of Connecticut below. Problems confronting these private and public institutions in providing facilities to accommodate a continuously increasing college enrollment are substantial. The condition of this challenge is generally recognized in our society and requires no elaboration. If a substantial number of accredited private colleges and universities are disqualified from receiving federal support for carefully restricted nonreligious purposes, then not only will they be unable to play any part in meeting the demand for increased enrollment but their very existence may be threatened. In such case, the burden on public institutions of higher education will be substantially increased. Indeed, the vital federal support to all institutions of higher education provided under the Higher Education Facilities Act of 1963 and similar federal programs may be threatened.

Consents of both appellants and appellees to the appearance of the American Council on Education, the Association of American Colleges, the National Association of State Universities and Land-Grant Colleges, the Association of American Universities and The Council for the Advancement of Small Colleges as amici have been filed with this brief.

ARGUMENT

The Higher Education Facilities Act of 1963[1] here drawn into question allocates federal funds to colleges and universities for the construction of academic facilities. These comprise structures suitable for use as classrooms, laboratories, libraries, or the like. In addition to meeting certain other criteria, the institutions must be accredited by a nationally recognized accrediting agency. No funds may be used for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity. . . ." 20 U.S.C. Sec. 751. The principal question is whether the inclusion of religiously affiliated colleges and universities in the broader class of institutions of higher learning eligible for this assistance contravenes the establishment clause of the first amendment.

In familiar contexts this Court has formulated the principles which sustain this Act against the present challenge. It has long been accepted that fire and police protection and similar services may permissibly extend to the secular and sectarian alike. See *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947). In *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961), the Court noted with respect to Sunday closing laws that "the present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963),

[1] 77 Stat. 363, 20 U.S.C. Sec. 701 (1963), hereafter cited as "the Act."

elaborated this theme in respect to permissible governmental action in terms, first, of a secular legislative purpose, secondly, of a primary effect which neither advances nor inhibits religion. *Board of Educ.* v. *Allen,* 392 U.S. 236 (1968), applied the *Schempp* formulation in validating a New York law requiring the lending of secular books free of charge to all students including those in attendance at parochial schools. *Walz* v. *Tax Comm'n,* 397 U.S. 664 (1970), sustained the validity of property tax exemptions for religious bodies among other educational and charitable institutions: the constitutional desiderata, according to the Court, were a "legislative purpose . . . not aimed at establishing, sponsoring, or supporting religion" and an end result or effect not involving "excessive government entanglement with religion." 397 U.S. at 674.

These decisions illustrate a vital point: the secular characteristics of an institution or activity may be regarded as conceptually (and constitutionally) distinct from commingled sectarian characteristics in considering the propriety of contested governmental action. If the secular characteristics are the subject matter of action otherwise within the competence of the state, and if the action results neither in excessive entanglements with religion nor, in primary effect, in its advancement or inhibition, then the action does not run athwart the establishment clause. Nowhere, perhaps, was this discreteness of function more clearly illustrated than in *Allen.* Taking as premises the adequacy of the *secular* education provided students in religious schools and the propriety of governmental action furthering secular education generally, the Court held constitutional the furnishing of secular textbooks to students in both public and parochial schools. On the record presented, the Court was unable to conclude

"either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

This case is similar to *Allen*. The educational goals which the Act seeks to, and does in fact, further are plainly secular. Congress found and declared that the security and welfare of the nation require that American youth "be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U.S.C. Sec. 701. To accomplish this goal, funds are made available to assist in the construction of academic facilities, but only to those colleges and universities which are accredited by a nationally recognized accrediting agency.[2] The principal nationally recognized accrediting agencies are the six regional associations which make up the Federation of Regional Accrediting Commissions of Higher Education. These agencies conduct examinations of colleges and universities and accredit those which meet certain academic standards. Of one of these regional associations, for example, it was recently said:

> "Middle States [Association of Colleges and Secondary Schools] has achieved a position of great

[2] The Act further requires the Commissioner of Education to "publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the *quality of education or training offered.*" 20 U.S.C. Sec. 751(f)(5) (emphasis added). Other criteria, consistent with a commitment to secular education, are imposed. 20 U.S.C. Sec. 751(f).

influence in American education. It has elevated the quality of education and has become a powerful instrumentality which sets policies in an area of vital concern to the public. Accreditation has been established in the public mind as a mark of distinction and quality." *Majorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459, 470 (D. Col. 1969). See also *Parsons College* v. *North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

Accreditation is a secular process. In a policy statement on institutional integrity adopted in 1966, the Federation of Regional Accrediting Commissions of Higher Education stated:

"By academic tradition and by philosophical principle an institution of higher learning is committed to the pursuit of truth and to its communication to others.

. . .

"A college or university is an institution of higher learning. Those within it have as a first concern evidence and truth rather than particular judgments of institutional benefactors, concerns of churchmen, public opinion, social pressure, or political proscription.

. . .

"Intellectual freedom does not rule out commitment; rather it makes it possible and personal. Freedom does not require neutrality on the part of the individual nor the educational institution — certainly not toward the task of inquiry and learning, nor towards the value systems which may guide them as persons or as schools.

"Hence institutions may hold to a particular political, social, or religious philosophy as may individual faculty members or students. But to

> be true to what they profess academically, individuals and institutions must remain intellectually free and allow others the same freedom to pursue truth and to distinguish the pursuit of it from a commitment to it."

The requirement of accreditation means in effect that whatever else an eligible institution may do, it must offer its students a *secular* education. Finally, to insure that funds allocated are used only for the construction of facilities contributing to the ability of the institution to provide a secular education, facilities used for sectarian instruction or religious worship or in connection with the program of a department of divinity, are expressly excluded.

There is no question that Congress may permissibly seek to further the secular educational objectives of colleges and universities. This Act is plainly structured to that end; the admixture of religion in the curriculum of some schools is thus of no greater constitutional significance here than in *Allen*. That a particular institution may perceive its principal mission as the propagation, teaching, or practice of religion is similarly without constitutional significance so long as in the process it imparts a secular education, in the sense of meeting the criteria of accreditation. Government is not barred from achieving its secular goals because they happen to coincide with those of a sectarian college or university. *Cf. McGowan* v. *Maryland,* 366 U.S. 420, 445 (1961); *Everson* v. *Board of Educ.,* 330 U.S. 1, 18 (1947). Government's concern, moreover, is only with the secular characteristics of the institutions. It follows that involvement with religion in the administration of the statute is at most tangential. The sectarian activities of colleges and universi-

ties remain free either from governmental support or interference. Section 757 of the Act provides, in fact, that:

> "No department, agency, officer, or employee of the United States shall, under authority of this Act, exercise any direction, supervision, or control over, or impose any requirements or conditions with respect to, the personnel, curriculum, methods of instruction, or administration of any educational institution."

To qualify for assistance under the Act, a religiously affiliated college must make the same showing as a secular institution. And to suggest that twenty years of constant surveillance on the part of government will be required to insure that facilities are not devoted to sectarian purposes is factitious. See Brief of Appellants at 42-43. On this theory, government would have to undertake the same course of prolonged surveillance with respect to secular institutions to insure that facilities are not used as gymnasiums or devoted to events for which admission is charged — also forbidden by the Act — or used for some other improper purpose. Evidently Congress believed that reliance on the good faith and representations of the colleges and universities concerned was sufficient; for it prescribed no detailed surveillance or administrative inquiry in the Act itself, and there has been no showing that the Commissioner of Education in fact administers the Act in such fashion, or that there is any necessity for doing so. The eligibility of an institution for assistance under the Act, quite simply, is measured by its secular characteristics. There is no potential for undue involvement or entanglement in this relationship.

The vice of the Act is said to be that it permits funds to be given to institutions where the propagation, teach-

ing, or practice of religion is a meaningful and major part of the total environment. Brief of Appellants at 9. No education, however, is secular in the sense of being value free. Indoctrination goes on in varying degrees and at many levels in the educational life of the individual. Philosophical, moral, and ethical beliefs and teachings are present in many curricula. These are views, in fact, which this Court has suggested may approach the religious in some sense. See *United States* v. *Seeger,* 380 U.S. 163 (1965); *Welsh* v. *United States,* 398 U.S. 333 (1970). Military values permeate the educational processes at the service academies; at some schools athletics are virtually an end in themselves. Other value systems assert the right to weight the environment in which secular education is imparted. But it hardly follows that simultaneous inculcation of any of these values so warps and distorts the curriculum as a whole that an acceptable level of secular learning cannot also be maintained. Sceptics have been bred in Roman Catholic schools, and pacifists at West Point.

It is perfectly clear that there can be differences of opinion over the merit — and the permissibility — of various biases which affect education. The underlying question is what shall be the attitude, in a constitutional sense, toward these differences. Shall religion, collectively, be singled out as the sole system of values which cannot constitutionally weight the educational process? The typical affirmative response seeks to draw support from the specific proscription of an "establishment of religion" in the first amendment. But it is really at that point that inquiry must start, not end. The first amendment says nothing of religion and education, nor does it speak to the permissibility of aiding institutions

of higher education in the construction of academic facilities. As we shall show, it was never thought to be the province of the first amendment to disable government in all its relations with religion, any more than with secular indoctrination of other sorts. With few exceptions this Court has not sought to lay this gloss on the Constitution, nor should it do so now.

It is asserted that the challenged statute must be judged by the strict no-aid-to-religion language of *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947). This language was quoted by the Court in *Walz*, but only as abundantly illustrating the "hazards of placing too much weight on a few words or phrases of the Court." 397 U.S. at 670. This statement is treated by the appellants as of negligible importance. It is submitted that it is, on the contrary, a clear indication that the rigid "no aid" test is not an authoritative gloss on the establishment clause.

The movement by the Court away from absolutist interpretations is in accord with historical evidence bearing on the original meaning of the clause, recently developed by the late Mark DeWolfe Howe. According to Howe, the opinions in *Everson* and certain other establishment clause cases reflected a one-sided view of the complex historical tradition embodied in the first amendment. These interpretations, which Howe characterized as a "leaning tower of absolutes," resulted from an erroneous assumption that the framers of the amendment "spoke in a wholly Jeffersonian dialect." Howe, The Garden and the Wilderness 168, 10 (1965). Howe's thesis was that the American tradition of church-state separation includes not only the Jeffersonian thread, but also the thread running back to Roger Williams. Both Jefferson and Williams wrote

metaphorically of a wall of separation, but they viewed the wall as serving quite different ends. Howe described the Jeffersonian principle of separation as rooted in deistic rationalism and anticlericalism. Church and state should be separated in order to "safeguard public and private interests against ecclesiastical depredations and excursions." *Id.* at 2. Following this view, the Court seemed to have assumed that "the First Amendment intended to keep alive the bias of the Enlightenment which asserted that government must not give its aid in any form to religion lest impious clerks tighten their grip upon the purses and the minds of men." *Id.* at 7.

The title of Howe's book, *The Garden and the Wilderness,* was suggested by a passage from Roger Williams. As Howe explained, "When the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." *Id.* at 6. The Williams wall protects churches not only against restraints such as those from which he had personally suffered, but also against the corrupting effects of government support. Williams and his follows believed that "spiritual freedom of churches is jeopardized when they forget the principle of separation." *Id.* at 2.

In Howe's judgment, the first amendment's prohibitions "at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than of Jefferson's. . . . [T]he predominant concern at the time when the First Amendment was adopted was not the Jeffersonian fear that

if it were not enacted the federal government would aid religion and thus advance the interests of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth." *Id.* at 19.

Williams' hostility to establishment of religion was grounded in his two-fold concept of human freedom in general and of religious freedom in particular. In his view, freedom is not merely an absence of external restraint; more profoundly, it is a condition of spirit. Free exercise of religion is not merely — or primarily — an activity free from hostile discrimination; it is an activity grounded in interior freedom. Legal establishment cannot generate free exercise of religion; what it can do—and what Williams believed it necessarily does — is to destroy the voluntariness of religious observance and render it unfree.

It follows, then, that respect for the Williams tradition of disestablishment does not call for a strict separation of church and state or a proscription of incidental or indirect aid to religion. What the Williams tradition does call for is proscription of aids which sap the vitality of religious freedom. Many indirect aids to religion, however, have no such vitiating tendency. Howe noted, for example, that he found it hard to believe that "Williams and his heirs were so deeply concerned with the maintenance of the wall that they would condemn the tax exemption of churches." *Id.* at 152. In *The Garden and the Wilderness,* Howe did not deal explicitly with the validity of the Act now before the Court. However, in 1961 his views were solicited by Senator Morse in regard to proposed construction loans for private and parochial schools. In his reply,

Howe rejected the view that such loans would be unconstitutional regardless of the use to be made of the buildings. He wrote: "I am satisfied that a valid line can be drawn between governmental support of activities that are predominantly of civil concern and those which are predominantly of religious significance." S. Doc. No. 29, 87th Cong., 1st Sess., p. 51 (1961).

While a rigid "no aid" rule is unjustified, the Jeffersonian thread in our church-state tradition is an effective reminder of the danger which may be present in some attempts to aid religious groups. This danger, as phrased by Justice Harlan in his concurring opinion in *Walz,* is that such attempts may require "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." 397 U.S. at 694. Such involvement may occur when grants are made on the basis of elaborate and discretionary qualifications which require government officials to become intimately involved in the administration or evaluation of religious agencies.

In the present case, it is not contended that the establishment clause forbids grants to all church-related colleges. Rather, the Court is asked to specify a degree of church relatedness or religious emphasis which will render government aid invalid. Colleges on the wrong side of the line are termed "sectarian"; sectarian institutions are defined as those in which "the propagation, teaching or practice of religion is a meaningful and major part of . . . [their] existence." Brief of Appellants at 9. For the factors upon which to base such a judgment, the appellants rely on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645,

672, 220 A. 2d 51, 65-66, *cert. denied,* 385 U.S. 97, (1966). There the court struck down a grant to Western Maryland College because of its "strongly Methodist image" and "flavor." *Id.* at 676-79, 220 A.2d at 68-70. It sustained, however, a grant to Hood College, a liberal arts college sponsored by the United Church of Christ. The religious purposes of Hood were interpreted as "not of a fervent, intense, or passionate nature, but . . . based largely upon its historical background." *Id.* at 672-76, 220 A.2d at 66-68.

The application of the *Horace Mann* criteria entails precisely the sort of involvement and entanglement against which this Court has warned. In *Walz,* Justice Harlan referred to governmental entanglement in "difficult classifications of what is or is not religious . . . ." 397 U.S. at 698. Unlike the process of accreditation, which is primarily an evaluation of the secular educational activities of an institution and which does not in any case involve government, a *Horace Mann* inquisition is concerned solely with an attempt to determine what is or is not religious.

If the *Horace Mann* rule were forced upon Congress and state legislatures, the effect on the character of American higher education would inevitably be away from a vigorous pluralism and toward a bland, secularized religious style. Colleges which have maintained a vigorous religious tradition but which are faced with critical financial problems would be placed under pressure to attenuate their character as religious colleges and treat their religious roots as mere facts of history. The concept of a sectarian institution as applied in *Horace Mann* is a superficial one which should have no constitutional significance. In a more important sense, Hood College is just as sectarian as are the Meth-

odist and Roman Catholic colleges so labeled in *Horace Mann:*

> "the liberal arts college which intends to be educationally serious will also be religiously and morally serious. And to be serious means to commit itself to some answers to the human questions — answers about which there is no universal consensus — answers which can shape its curriculum and its style of life so that the human is enhanced. *Then to be a liberal arts college at all means to be 'sectarian' at least in this sense, that some meanings of the human and the humane are embraced while others are rejected."* Council of Protestant Colleges and Universities, The Church College and the Public Good 7 (1969).

In *Walz,* Justice Brennan wrote of the contributions which religious and nonreligious groups make "to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." 397 U.S. at 689. These words are reminiscent of an article written by Alexander Meiklejohn in 1949, criticizing the strict wall of separation doctrine expressed in the *Everson* and *McCollum* cases. Meiklejohn, *Educational Cooperation Between Church and State,* 14 Law & Contem. Prob. 61 (1949). With respect to freedom of speech, Meiklejohn was an absolutist.[8] But he saw clearly the stultification inherent in strict separation of church and state. He emphasized that religious and nonreligious citizens in a democratic state need nourishing roots for belief both in democratic values and in the possibility of man's growth in responsible freedom. He noted that for half our people, more or less, religious belief is the source from which democratic institutions derive their

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[8] See Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

moral validity, while for the nonbelievers, himself among them, objects of loyalty must be found "within the human spirit itself." But he noted also that religious sects in the United States "spend quite as much of their energies upon their differences of belief as upon their unity of purpose," while in like fashion nonbelievers, "staggering under the task of finding, within human inspiration itself, an adequate basis for our mode of life, have won . . . no secure forms of cooperation or, even, of mutual understanding." *Id.* at 62-63. In these circumstances, Meiklejohn viewed strict separation of church and state as frustrating the aims of education for citizenship. The question, as he saw it, was

> "How can the many sects, religious and nonreligious, with due regard for the sectarian freedom of each, work together for the promoting of the general welfare? We shall not accomplish that purpose by arranging that, in every way possible, the teaching of our children and adults shall be cut off from our attempts to understand ourselves, our society, and our world." *Id.* at 71-72.

Meiklejohn urged that the question of governmental assistance to independent schools be left to Congress and state legislatures for decision.

It is sometimes argued that all programs of aid to education in religious colleges and schools — even where there is no involvement in the details of planning or administration — must be ruled out in order to avoid political strife and controversy. Such contentions reflect a disparaging view of the health of American religious pluralism in the 1970's, a view dominated by the fear that differences between religious and nonreligious groups can lead only to hostility and strife. It is a

view which is blind to the growth of irenic and ecumenical spirit, a growth which was greatly accelerated by the work of Vatican Council II and its Declaration on Religious Liberty.

The vigorous pluralism of which Justice Brennan wrote in *Walz* is one, we submit, in which differences over religion are not divisive. It is a pluralism which draws its unity from a widely shared belief, not in religion necessarily, but in religious freedom. It is a pluralism in which principal religious and nonreligious groups not only claim freedom for themselves, but affirm equal freedom for others. In such a society individuals can develop internal freedom, which is reflected in tolerance of criticism and openness to new insight. Individuals are free to doubt and to believe. They affirm freedom because they realize the need for dialogue, because individuals and groups have a stake —broadly speaking, a religious stake—in the freedom of others. This pluralism is also one in which there is a sensitivity to the differing needs of different groups and a disposition to accommodate these needs. Such a society obviously will not embody perfection; it may contain groups which do not believe in religious freedom. But it can accommodate this pluralism if such groups are no great threat to freedom, if a trust in the common commitment to religious freedom prevails among the principal groups.

The first amendment protects the freedom of religious belief and unbelief from government sponsorship and government restraint. Under this protection the free pluralism of American society can mature, a pluralism religious and nonreligious. The establishment clause leaves Congress and state legislatures free to foster this pluralism. This Court's decisions have

recognized this freedom; they support the constitutionality of the Higher Education Facilities Act of 1963.

CONCLUSION

For the reasons stated, it is urged that the Court affirm the decision of the court below.

Respectfully submitted,

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